

PART VII: APPEALS

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Any person who is the subject of a founded investigation of abuse and/or neglect may appeal that finding and any inaccurate information about the abuser that is contained in the CPS record. There is no difference in the appeal process of founded dispositions for “in family investigations” and “out of family investigations”. There are three levels of administrative appeals:

- Conference with the local department of social services
- Administrative hearing conducted by a state hearing officer
- Judicial review by the Circuit Court

This chapter explains the statutory and regulatory requirements for CPS appeals and provides guidance where needed to further explain these requirements.

The statutory authority for a person seeking review of a local department's finding of abuse or neglect can be found in § [63.2-1526](#) of the *Code of Virginia*. The regulatory authority for appeals of findings of abuse and neglect can be found in 22VAC40-705-190.

A. DEFINITIONS

The following definitions regarding CPS appeals are applicable to this chapter.

22VAC40-705-190(A): Appeal is the process by which the abuser and/or neglector may request amendment of the record when the investigation into the complaint has resulted in a founded disposition of child abuse and/or neglect.

22VAC40-705-10: "Administrative appeal rights" means the child protective services appeals procedures for a local level informal conference and a state level hearing pursuant to § [63.2-1526](#) of the Code of Virginia, under which an individual who is found to have committed abuse and/or neglect may request that the local department's records be amended. "Appellant" means anyone who has been found to be an abuser and/or neglector and appeals the founded disposition to the director of the local department of social services, an administrative hearing officer, or to circuit court.

When a person who is the subject of a founded investigation requests a local conference or a state administrative hearing that person is referred to as the appellant.

B. CPS APPEAL AUTOMATICALLY STAYED DURING CRIMINAL PROCEEDINGS AGAINST ABUSER

22VAC40-705-190(C). Whenever an appeal is requested and a criminal charge is also filed against the appellant for the same conduct involving the same victim child as investigated by the local department, the appeal

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process shall be stayed until the criminal prosecution in circuit court is completed pursuant to § [63.2-1526](#) (C) of the Code of Virginia. During such stay, the appellant's right of access to the records of the local department regarding the matter being appealed shall also be stayed. Once the criminal prosecution in circuit court has been completed, the local department shall advise the appellant in writing of his right to resume his appeal within the time frames provided by law and regulation pursuant to § [63.2-1526](#) (C) of the Code of Virginia.

1.0 Criminal Proceedings in Juvenile or Circuit Court

When the local department learns that a criminal process has been initiated in either juvenile or circuit court, the local department must notify the appellant in writing that the CPS administrative appeal process is stayed and that his right to access his CPS record is suspended until the criminal process is completed *in circuit court and the judge enters a final appealable order*. Cases that are continued for a period of time or taken under advisement do not constitute a final appealable order.

CPS appeals should be stayed if a criminal charge originates in the juvenile and domestic relations court, because the appellant may appeal a conviction to the Circuit Court.

The local department must notify the appellant in writing that the CPS administrative appeal may resume at the conclusion of the criminal proceeding. Local departments are encouraged to establish procedures with the court to advise the local department when the criminal process has been completed in order to initiate the CPS administrative appeal process on a timely basis.

The local department should seek guidance from its legal representative to *determine if a final appealable order in the criminal proceeding has been entered and to clarify whether the criteria for a stay of appeal has been met before notifying the appellant*.

2.0 Criminal Proceedings in Military Court

The Code stays CPS administrative appeal proceedings until "the criminal prosecution in circuit court is completed." The stay provisions apply when there are criminal charges "against the appellant for the same conduct involving the same victim as investigated by the local department." Va. Code § 63.2-1526(C). The intent of the stay provisions is to protect the appellant from having to testify in the CPS case while the criminal matter is pending. It also is designed to protect the agency case record from inappropriate use by the appellant in the criminal proceeding. Given the intent of the statute, the stay provisions noted in 1.0 Criminal Proceedings in Juvenile or Circuit Court apply to the prosecution of a criminal charge in military courts.

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C. LOCAL CONFERENCE

1.0 Appellant Must Request Local Conference

22VAC40-705-190(B). If the alleged abuser and/or neglector is found to have committed abuse or neglect, that alleged abuser and/or neglector may, within 30 days of being notified of that determination, submit a written request for an amendment of the determination and the local department's related records, pursuant to § [63.2-1526](#) (A) of the Code of Virginia. The local department shall conduct an informal conference in an effort to examine the local department's disposition and reasons for it and consider additional information about the investigation and disposition presented by the alleged abuser and/or neglector. The local department shall notify the child abuse and neglect information system that an appeal is pending.

When the local department receives a written request for a local conference, the local department must stamp the date of receipt on the appeal request.

If the alleged abuser or neglector fails to make a timely request for a local conference, then the alleged abuser or neglector forfeits his right to a local conference.

2.0 Document Pending Local Appeal

22VAC40-705-190(B). ... The local department shall notify the child abuse and neglect information system that an appeal is pending.

3.0 Time Frame to Conduct Local Conference

22VAC40-705-190(D). The local department shall conduct an informal, local conference and render a decision on the appellant's request to amend the record within 45 days of receiving the request. If the local department either refuses the appellant's request for amendment of the record as a result of the local conference, or if the local department fails to act within 45 days of receiving such request, the appellant may, within 30 days thereafter and in writing, request the commissioner for an administrative hearing, pursuant to § [63.2-1526](#) (A) of the Code of Virginia.

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The local department must make a good faith effort to schedule and conduct a local conference. If the local department fails to conduct a local conference, the local department must document in the automated data systems the reasons why the local conference was not conducted.

4.0 Appellant May Request Extension

22VAC40-705-190(E). The appellant may request, in writing, an extension of the 45-day requirement for a specified period of time, not to exceed an additional 60 days. When there is an extension period, the 30-day time frame to request an administrative hearing from the Commissioner of the Department of Social Services shall begin on the termination of the extension period pursuant to § [63.2-1526](#) (A) of the Code of Virginia.

The extension period begins at the end of the original 45 days.

5.0 Local Department Must Provide Information to Appellant

22VAC40-705-190(F). Upon written request, the local department shall provide the appellant all information used in making its determination. Disclosure of the reporter's name or information which may endanger the well-being of a child shall not be released. The identity of collateral witnesses or any other person shall not be released if disclosure may endanger their life or safety. Information prohibited from being disclosed by state or federal law or regulation shall not be released. In case of any information withheld, the appellant shall be advised of the general nature of the information and the reasons, of privacy or otherwise, that it is being withheld, pursuant to § [63.2-1526](#) (A) of the Code of Virginia.

Upon written request from the appellant, the local department shall provide the appellant all information used in making its determination with the following exceptions:

- a. The complainant's name shall not be released.
- b. The identity of collateral witnesses or any other person shall not be released if disclosure may endanger their life or safety.
- c. Information prohibited from being disclosed by state or federal law or regulation shall not be released.

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If information is withheld, the appellant shall be advised of the general nature of such information, the reason the information is being withheld, and the appellant's right to petition the juvenile and domestic relations court, or family court, to enforce any request for information which has been denied.

Local departments are advised to consult with local county or city attorneys for advice and guidance on the release of information to appellants.

5.1 Electronic Recording of Alleged Victim Interview

The appellant is entitled to a copy of the electronic recording of the alleged victim interview unless disclosure of the contents of the recording would endanger the health or safety of the child or any other person pursuant to § [63.2-1526](#) (A) of the *Code of Virginia*, or the information is protected by federal statute, the *Code of Virginia* or the Virginia Administrative Code.

The local department is not required to release confidential information contained on the recording if it is protected by law or regulation. However, the local department must abstract or summarize information from the recording or convert the audio or video tape recording into one form, such as a typed transcript, so that information needing to remain confidential may be redacted or edited out. The local department should make reasonable efforts to reach an agreement with the alleged abuser or neglecter concerning the production of the electronic recording.

Local departments are encouraged to seek consultation from their legal representatives in this matter.

6.0 Conduct the Local Conference

The Department developed a Local Conference Handbook for agency directors to provide additional guidance and best practice to conduct local conferences. It is available at <http://spark.dss.virginia.gov/divisions/appeals/cps/handbook.cgi>

6.1 Who May Preside Over the Local Conference

22VAC40-705-190(G). The director of the local department, or a designee of the director, shall preside over the local conference. With the exception of the director of the local department, no person whose regular duties include substantial involvement with child abuse

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and neglect cases shall preside over the local conference, pursuant to § [63.2-1526](#) (A) of the Code of Virginia.

6.2 Appellant May Seek Assistance of Counsel

22VAC40-705-190(G)(1). The appellant may be represented by counsel, pursuant to § [63.2-1526](#) (A) of the Code of Virginia.

6.3 Local Conference Participants

Participants in the local conference will include the appellant and, if the appellant chooses, a ~~legal~~ representative, and the worker and supervisor who made the founded disposition. The representative may be an attorney who may appear in lieu of the appellant.

Neither the alleged victim nor victim's parents *if they are not the appellant* are permitted to attend the local conference.

6.4 Appellant May Present Testimony at Local Conference

22VAC40-705-190(G)(2). The appellant shall be entitled to present the testimony of witnesses, documents, factual data, arguments or other submissions of proof, pursuant to § [63.2-1526](#) (A) of the Code of Virginia.

Any additional information or documentation presented at the local conference must be added to the CPS record and documented in the automated data system.

6.5 Time Frame to Notify Appellant of Results of Local Conference

22VAC40-705-190(G)(3). The director of the local department, or a designee of the director, shall notify the appellant, in writing, of the results of the local conference within 45 days of receipt of the written request from the appellant unless the time frame has been extended as described in subsection E of this section...

6.6 Local Director's Authority to Sustain, Amend, or Reverse Findings

22VAC40-705-190(G)(3). ...The director of the local department, or the designee of the director, shall have the

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authority to sustain, amend, or reverse the local department's findings...

As a result of the local conference, the local director or the local director's designee may amend the final disposition and case record.

The local director, or designee, has the authority to amend parts of the record by ordering that certain parts be stricken if those parts are proven to be inaccurate or irrelevant.

6.7 Notify Appellant

22VAC40-705-190(G)(3). ... Notification of the results of the local conference shall be mailed, certified with return receipt, to the appellant. The local department shall notify the child abuse and neglect information system of the results of the local conference.

The written decision shall be mailed to the appellant as specified in 22VAC40-705-190 and shall include:

- a. The action to be taken on the request for amendment; and
- b. Explanation of any additional appeal rights available to the appellant.

6.8 Document Results of Local conference

22VAC40-705-190(G)(3). ... The local department shall notify the child abuse and neglect information system of the results of the local conference.

6.9 Notify All Original Recipients of Initial Disposition, if Amended

The local department must notify in writing all persons who were originally informed of the original disposition, if the local conference results in an amended or reversed disposition. This includes the complainant as well as custodial and non-custodial parents of all victim children.

D. STATE ADMINISTRATIVE APPEAL

The State Appeals Hearings Officers developed a guide for local agencies that explains the state appeal hearing process in more detail. It is available at <http://spark.dss.virginia.gov/divisions/appeals/cps/handbook.cgi>.

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1.0 Appellant Must Request State Administrative Hearing

22VAC40-705-190(H). If the appellant is unsatisfied with the results of the local conference, the appellant may, within 30 days of receiving notice of the results of the local conference, submit a written request to the commissioner for an administrative hearing pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

2.0 Exception to Time Frames

There is an exception to requesting an administrative hearing within 30 days of receipt of local conference results. The appellant may request in writing that the Commissioner grant an administrative hearing to review the request for amendment if:

- a. The local department refuses to amend their report (disposition),
or
- b. The local department fails to act within 45 days after receiving the appellant's request, unless an extension has been requested by the appellant.

If the local department refuses to conduct a local conference within the 45 day time frame (unless there is an extension of that time frame), then the 30 day time frame for the appellant to request a state administrative hearing begins running at the end of the 45 day time frame. The request to the Commissioner must be made in writing within 30 days thereafter.

3.0 Document Pending State Appeal

The State Hearing Officer notifies the automated data system that a state appeal is now pending.

4.0 Who May Conduct State Administrative Appeals

22VAC40-705-190(H)(1). The Commissioner shall designate a member of his staff to conduct the proceeding, pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

5.0 Time Frame to Schedule State Administrative Hearing

22VAC40-705-190(H)(2). A hearing officer shall schedule a hearing date within 45 days of the receipt of the appeal request unless there are delays due to subpoena requests, depositions or scheduling problems.

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6.0 State Administrative Appeal Officers Authorities

6.1 Subpoenas & Depositions

22VAC40-705-190(H)(3). After a party's written motion and showing good cause, the hearing officer may issue subpoenas for the production of documents or to compel the attendance of witnesses at the hearing. The victim child and that child's siblings shall not be subpoenaed, deposed or required to testify, pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

6.2 Review of Subpoena or Deposition Decision by J&DR Court or Family Court

22VAC40-705-190(H)(4). Upon petition, the court shall have the power to enforce any subpoena that is not complied with or to review any refusal to issue a subpoena. Such decisions may not be further appealed except as part of a final decision that is subject to judicial review pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

6.3 Depositions

22VAC40-705-190(H)(5). Upon providing reasonable notice to the other party and the hearing officer, a party may, at his own expense, depose a non-party and submit that deposition at, or prior to, the hearing. The victim child and the child's siblings shall not be deposed. The hearing officer is authorized to determine the number of depositions that will be allowed pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

7.0 Information to be Provided to Appellant and State Hearing Officer

22VAC40-705-190(H)(6). The local department shall provide the hearing officer a copy of the investigation record prior to the administrative hearing. By making a written request to the local department, the appellant may obtain a copy of the investigation record. The appellant shall be informed of the procedure by which information will be made available or withheld from him. In any case of information withheld, the appellant shall be advised of the general nature of the information and the reasons

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that it is being withheld pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

8.0 Conduct State Appeal Hearing

8.1 Appellant May Seek Assistance of Counsel

22VAC40-705-190(H)(7). The appellant and the local department may be represented by counsel at the administrative hearing.

8.2 Oath & Affirmation

22VAC40-705-190(H)(8). The hearing officer shall administer an oath or affirmation to all parties and witnesses planning to testify at the hearing pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

8.3 Burden on Local Department to Prove Disposition

22VAC40-705-190(H)(9). The local department shall have the burden to show that the preponderance of the evidence supports the founded disposition. The local department shall be entitled to present the testimony of witnesses, documents, factual data, arguments or other submissions of proof.

8.4 Submission of Proof

22VAC40-705-190(H)(10). The appellant shall be entitled to present the testimony of witnesses, documents, factual data, arguments or other submissions of proof.

8.5 Submission of New Evidence

22VAC40-705-190(H)(11). The hearing officer may allow either party to submit new or additional evidence at the administrative hearing if it is relevant to the matter being appealed.

8.6 Hearing Officer Not Bound by Strict Rules of Evidence

22VAC40-705-190(H)(12). The hearing officer shall not be bound by the strict rules of evidence. However, the

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hearing officer shall only consider that evidence, presented by either party, which is substantially credible or reliable.

8.7 Allow Record to Remain Open for Additional Evidence

22VAC40-705-190(H)(13). The hearing officer may allow the record to remain open for a specified period of time, not to exceed 14 days, to allow either party to submit additional evidence unavailable for the administrative hearing.

9.0 State Administrative Appeal Hearing Decision

9.1 Notify Appellant and Local Department of Results of State Administrative Appeal Hearing

22VAC40-705-190(I). Within 60 days of the close of receiving evidence, the hearing officer shall render a written decision. The hearing officer shall have the authority to sustain, amend, or reverse the local department's findings. The written decision of the hearing officer shall state the findings of fact, conclusions based on regulation and policy, and the final disposition. The decision will be sent to the appellant by certified mail, return receipt requested. Copies of the decision shall be mailed to the appellant's counsel, the local department and the local department's counsel...

9.2 State Appeal Officer May Remand Case to Local Department

22VAC40-705-190(H)(14). In the event that new or additional evidence is presented at the administrative hearing, the hearing officer may remand the case to the local department for reconsideration of the findings. If the local department fails to act within 14 days or fails to amend the findings to the satisfaction of the appellant, then the hearing officer shall render a decision, pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

9.3 Appellant Has Further Right of Review by Circuit Court

22VAC40-705-190(J). The hearing officer shall notify the appellant of the appellant's further right of review in

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circuit court in the event that the appellant is not satisfied with the written decision of the hearing officer. Appeals are governed by Part 2A of the rules of the Supreme Court of Virginia. The local department shall have no further right of review pursuant to § [63.2-1526](#) (B) of the Code of Virginia.

22VAC40-705-190(K). In the event that the hearing officer's decision is appealed to circuit court, the department shall prepare a transcript for that proceeding. That transcript or narrative of the evidence shall be provided to the circuit court along with the complete hearing record. If a court reporter was hired by the appellant, the court reporter shall prepare the transcript and provide the court with a transcript.

9.4 Document Results of State Administrative Appeal

22VAC40-705-190(I). ...The hearing officer shall notify the child abuse and neglect information system of the hearing decision...

9.5 Notify All Original Recipients if Disposition is Amended or Reversed by State Appeal Hearing Officer

22VAC40-705-190(I). ...The local department shall notify all other prior recipients of the record of the findings of the hearing officer's decision.

The local department must notify in writing all persons who were originally informed of the original disposition, if the state appeal hearing results in an amended or reversed disposition. This includes the complainant as well custodial and non-custodial parents of all victim children.